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No. 07-337

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

SANJAY H. PATEL,

Petitioner,

v.

CONDOLEEZA RICE, In Her Official Capacity As SECRETARY OF STATE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY TO BRIEF IN OPPOSITION

KENT F. BROOKS
LAW OFFICE OF KENT F. BROOKS
8117 Preston Rd., Suite 300
Dallas, Texas 75225
(214) 706-9151 – Telephone
(214) 706-9152 – Facsimile

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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ARGUMENT

I.

The questions presented – whether under *Knock Jan Fat,* Petitioner submitted prima facie proof of citizenship by birth in the United States and thereby shifted the burden to the United States; and whether under *Afroyim v. Rush*, the proof was sufficient to deny him citizenship – were properly raised and preserved, for the following reasons:

Question One. (*Knock Jan Fat*) The District Court did address it when it held under 22 U.S.C. § 2705 a passport is proof of citizenship during its period of validity and that under 22 C.F.R. § 51.4(h)(2), the passport became invalid when Petitioner reported it lost. (App. 7-8). The Fifth Circuit affirmed finding no error of law. (App. 1). The Fifth Circuit reviews all disputes necessarily embraced in a district court's conclusion. *Belt v. EmCare, Inc.*, 444 F.3d 403, 409 (5th Cir. 2006).[1]

Question Two. (*Afroyim v. Rush*) Petitioner did not abandon his claim that the birth certificate was prima facie evidence of citizenship. Petitioner said: "Admittedly, the district court refused to admit some

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[1] The issue is not of "limited importance." The Department of State acknowledges that over 300,000 are lost or stolen passports. *See* Remarks of Frank Moss, Deputy Assistant Secretary for Passport Services before the International Relations Committee, U.S. House of Representatives, June 23, 2004, http://www.state.gov/r/pa/ei/otherstmy/37014.htm.

of this evidence at trial and refused to give any weight to some evidence that was admitted. However, the un-controverted documentary and testimonial evidence that was admitted at trial and was not the subject of the District Court's discussion of unworthy evidence established that Patel was born in Chicago, Illinois." (Pet. C.A. Br. 8). The District Court did not discuss whether the birth certificate, which had been admitted into evidence at trial, was not worthy of belief,[2] rather it held that without the underpinning original documents in evidence it could not determine what weight to give it and so no weight would be given. (App. 9-10). There was no concession abandoning the issues of the birth certificate.

Nor did Petitioner fail to adequately raise the evidentiary value of his birth certificate, without the production of the documents it recites as the supporting evidence, in the Fifth Circuit. Petitioner's Brief addressed (1) the District Court's summary judgment rulings that the birth certificate, without the underlying documents, was evidence which may assist Petitioner in satisfying his burden to establish that he was born in the United States and that denied a take nothing summary judgment. (Pet. C.A. Br. 4, Record Excerpts 12) and (2) that at trial the District Court failed to give it any weight since the originals of the underlying support documents had not been produced

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[2] The District Court, when it discussed other evidence, used "worthy" and "credible" or "not credible." (App. 9-14).

by the magistrate's pretrial deadline. (Pet. C.A. Br. 4-5). Petitioner's Issue One was that he had presented evidence that it was plausible that he was born in Chicago, Illinois in 1973 and there was no evidence he was born other than in the United States. *Id.* at 1. Petitioner specifically argued that the evidence he offered in the summary judgment proceeding was prima facie evidence of citizenship and that his evidence at trial was more than sufficient to establish a prima facie case that he was born in Chicago, Illinois. *Id.* at 8.

II.

Further, the United States demeans and dismisses certain of Petitioner's witnesses by *ad hominem* attacks and lauds it own witness. In this manner, it seeks to avoid the burden of proof questions presented to this Court. However, to the contrary, the United State's "star" witness, Ms. Buffalo, had no personal knowledge to support her trial testimony and recanted her prior deposition testimony. By contrast, Dr. Jesani and Ghanshyam Patel ("Ghanshyam") had either personal knowledge of the facts, or admitted to what extent they relied on the statement of others. In fact, the United States' attack on these witnesses achieves nothing:

1. The proof at trial of Petitioner's birth in the United States included his previously issued, but lost, passport and his birth certificate, neither of which the District Court gave any weight. (App. 6-10).

Additional proof in the form of the affidavit of the medical person in attendance at Petitioner's birth in Chicago in 1973 (P.'s Ex. 15) and school records of Petitioner's early years, upon which the birth certificate was issued, were not allowed in evidence because the originals were not provided by the magistrate's deadline. (App. 6).

2. There was also other evidence admitted at the trial that proved Petitioner's birth in Chicago. A DNA test confirms Harikrushna Patel ("H. Patel") and Petitioner are father and son. (P.'s Ex. 17). Documents in H. Patel's A-File, verified in 1974 by an attorney Ben H. Kim, show H. Patel's address in 1973 was 850 W. Eastwood, Chicago, Illinois. (D.'s Ex. 2, pp. 40-41). A 1996 affidavit, submitted in support of Petitioner's 1996 application for passport, was by a woman identifying herself as Deviani S. Patel AKA Bina S. Patel and relates that she is the mother of Petitioner from an intimate affair with H. Patel when she was unmarried and that on September 4, 1973 she gave birth to Petitioner in Chicago in the residence she shared with H. Patel with the medical assistance of an Indian student doctor and that H. Patel was married at that time and, therefore, she took Petitioner to India and gave him to his grandparents to raise. (D.'s Ex. 3, pp. 59-60). Petitioner's verified statements and trial testimony was that he had been told by his grandparents that he had been born in Chicago, Illinois on September 4, 1973, H. Patel was his father and that his mother Devyani had taken him to India when he was approximately one

and a half years old. (1Tr:31-33). He testified that he was then raised in India by his father's parents. *Id.* There was no evidence to the contrary and the District Court did not find this testimony not worthy of belief.

3. Ms. Sanchez, a Fraud Prevention Manager within the Department of State, testified that the affidavit of the birth mother is a document that they would request where there is a noninstitutional birth in the United States. (2Tr:319). She explained that because there is no evidence and the fathers are not always present at the time the child is born, "who better would know the information about where the birth occurred . . . " (2Tr:340). She testified that it is not at all unusual that someone born in the United States is taken to another country and raised for a period of time. (2 Tr:332-33). Petitioner, by March of 1996, had provided the United States with a completed government form setting out the names and address of his paternal grandparents, his maternal grandparents' names and town of residence in India and the name, United States address and telephone number of his uncle and his cousin as part of his passport applications. (D.'s Ex. 3, pp. 22-23). Petitioner submitted both the affidavit and completed government form in 1996 as part of the documentation for his passport applications. (D.'s Ex. 3).

4. A United States Department of State Special Agent in diplomatic security, who was assigned one and a half years prior to the trial to investigate Petitioner's passport applications and to get the facts,

did not believe any of the documents submitted in support thereof were forged, fabricated or untrue. (2Tr:268). A Rhode Island notary signed and notarized the affidavit and his name, Frank Weiss, along with his address and phone number, were disclosed as witness identification pursuant to the court's pretrial scheduling order. (R:1480). So, Petitioner provided prima facie proof of his birth in the United States without the testimony of H. Patel, Dr. Jesani or Ghanshyam and without the Clinic records.

5. Petitioner submitted a Chicago Department of Health *Pediatric Health History* form, signed and dated September 12, 1973 by the reviewing physician.[3] (P.'s Ex. 13, pp. 23-25). It reflects a father (H. Patel), a mother (Bina Patel) and a child (Sanjay Patel), prenatal care in Chicago in the eighth month of the pregnancy, a pregnancy that did not go to a full nine months term and the child's birth place at 850 W. Eastwood, Chicago, Illinois. *Id.*

6. Ms. Buffalo was the sole witness for the United States mentioned in the District Court's opinion (App. *passim*) and relied on in the Opposition

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[3] Ms. Buffalo stated that she could not read the handwritten name of that reviewing physician (3Tr:487), that in 1973-74 the clinic had used the services of volunteer doctors who were not considered employees and she could not name all the doctors at the clinic in 1973-74. (3Tr:474-75). Although Ms. Buffalo testified she did not recognize the doctor as ever having worked at the Clinic, the Clinic's logbook with dates in April and May of 1978 (after she was employed) contains this doctor's initials on a near daily basis. (D.'s Ex. 42).

in this Court. (Opp. *passim*) as discrediting the 1973-74 records from the Chicago Department of Health-Uptown Clinic. But, she was first employed by the Department of Health in April of 1978 as a dental assistant at the Uptown Clinic where she stayed only four years then transferred. (3Tr:413-14). She was subsequently laid off altogether for approximately a year and a half and did not return to the clinic until 1995 or 1996. *Id.*

Under cross-examination, Ms. Buffalo contradicted her deposition testimony on the relevant issues. (3Tr:473-74, 490-91, 511-12). And, she admitted that each aspect of her testimony concerning the facts relating to who the nurses and doctors were at the Uptown Clinic in 1973 and 1974, what were the forms used for pediatric patients in those years at that clinic and what were the practices and procedures used there concerning the patient files and assigning "unique" patient numbers was not based on her personal knowledge. (3Tr:470-76). On redirect, the District Court sustained an objection to her offering an opinion on whether the Uptown Clinic records related to the Petitioner, Sanjay Patel, as being beyond her personal knowledge because she was not there at the time the documents appeared to have been created. (R:526).

Ms. Buffalo's testimony was contradicted by the Public Health custodian of the records of the Uptown Clinic who testified by affidavit that all of the documents submitted by Petitioner as medical records relating to him, including the three pages of *Pediatric*

Health History form, were "from the archived official patient records of Uptown Clinic relating to Sanjay Patel," were "exact duplicates of the originals" and "were made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those facts." (P.'s Ex. 8). Ms. Buffalo, on cross-examination, admitted that this form was in use in the 1970s and that she could not state that it was not in use in 1973. (3Tr:485-86). She subsequently admitted that the form was a standard form in use in 1973 and 1974. (3Tr:511).

7. The District Court chose to give no weight to the testimony of Dr. Jesani and Ghanshyam on two very narrow related issues. (App. 12-13). Was the pregnant Indian woman they saw with H. Patel in Chicago in 1973, before and after she gave birth to a son in their apartment, carrying Petitioner; and is Petitioner the baby they saw after she gave birth. *Id.* Both witnesses are naturalized American citizens. (2Tr:298, 1Tr:107).

Dr. Jesani (a Kenyan, English by birth) had received his undergraduate and medical degrees in the United States, had done his internship in Chicago and in 1972 had started a life-long (32 years) medical practice in Chicago in the under served, ethnically mixed area of indigent people. (1Tr:105-08). He treated the woman with H. Patel who had been referred to him by one of Dr. Jesani's relatives (1Tr:105, 117-18) and saw her and the baby, professionally, after she gave birth. (1Tr:112-13). Giving

medical treatment to such people was Dr. Jesani's profession (1Tr:121-22) until he retired to assume his current position as regional director of seven states in the Midwest United States for the Aga Khan Foundation that helps third world countries in the fields of health care and education. (1Tr:108). He testified that the at-home birth of a boy they named Sanjay was a first for him in his beginning practice. (1Tr:113). There is NO evidence to the contrary.

Ghanshyam, an Indian, came to Chicago in March 1973 on a student visa (2Tr:299) and befriended a pregnant woman, a fellow Indian, he met and gave her his phone number. (2Tr:300-01). She was staying at 850 Eastwood. (2Tr:301). He subsequently got a call in Chicago in September 1973 from H. Patel, whom he had met in India prior to coming to Chicago. (2Tr:299-301). He also ran into H. Patel in Chicago who was complaining about the woman's health and later, when H. Patel and the woman needed a ride to get her attention late in the pregnancy, and asked Ghanshyam for a ride, Ghanshyam gave a ride to them. (2Tr:301-02). And, after the birth of the woman's baby, H. Patel called him and he visited them in the apartment where it appeared to Ghanshyam that the baby boy they had named Sanjay had been born. (2Tr:302, as corrected at R:2000-02). That is called human compassion among people facing a new environment far from their native land. There is NO evidence to the contrary.

They both were completely candid that they were friends of H. Patel and were willing to be of help in the litigation. Willingness to get involved does not

raise an inference of dishonesty. And, that's it. That is the sole basis for their interestedness in Petitioner's position. And both readily acknowledged that they had not had long-term and frequent contact with Petitioner to enable them to identify him now as the infant, so that they are relying on what H. Patel told them on that issue.

But, what Ghanshyam and Dr. Jesani saw and did and when and where it all occurred is all based on their personal knowledge and is not directly controverted by the circumstances nor any other evidence. In fact, most of their testimony is corroborated by the other uncontroverted evidence. And, if not Petitioner, who was that "other" Sanjay? So, unlike Dr. Jesani and Ghanshyam who lived the events in 1973 they testified to, Ms. Buffalo is working totally on *post hoc* suppositions about who were doctors employed by or volunteering at the Uptown Clinic three years before she got there.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

KENT F. BROOKS
Bar No. 03070710
LAW OFFICE OF KENT F. BROOKS
8117 Preston Rd., Suite 300
Dallas, TX 75225
(214) 706-9151 – Telephone
(214) 706-9152 – Facsimile